No. 80-6704

JUN 16 1981
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ORIGINAL COPY

ORSON G. WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-6704

ORSON G. WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was unlawfully arrested and that evidence seized at the time of his arrest should have been suppressed.

After a jury trial in the United States District Court for the District of Columbia, petitioner was convicted of possession of heroin, in violation of D.C. Code §33-402, and possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a). He was sentenced to six years' imprisonment, to be followed by a six-year special parole term. A divided panel of the court of appeals affirmed (Pet. App.).

1. The facts are set forth in the majority opinion of the court of appeals (Pet. App. 3-7). On the evening of September 11, 1979, Detective Hill, a District of Columbia narcotics officer, received an anonymous telephone tip informing him that a 19 to 20 year old black man known as "Nicky," wearing a blue jumpsuit with white stripes, had parked a 1971 Ford LTD in front of No. 1 15th Street, N.E., and had driven away in a 1974 four-door Oldsmobile; the caller provided the license tag numbers of both vehicles. The caller further stated that Nicky and the unidentified driver of the Oldsmobile were involved in narcotics

traffic and would be "dirty" (i.e., in possession of drugs) when they returned. The caller did not reveal how he obtained this information and did not identify himself. Detective Hill and his partner, Detective Sanchez-Serrano, drove an unmarked police car to the area described by the caller, where they found the Ford LTD parked in accordance with the tip. Several minutes later the Oldsmobile, driven by petitioner, pulled up behind the Ford. Also seated in the car were a young black male in a blue sweatsuit -- later identified as co-defendant Lawrence "Nicky" Anderson -- and a juvenile. The officers drove over to the Oldsmobile and double-parked their vehicle in a manner which made it difficult (but not impossible) for the Oldsmobile to pull away. The officers, who were in plainclothes, then displayed police identification, unholstered their revolvers, and approached the Oldsmobile.

When he reached the driver's side of the car, Detective Hill announced, "Police, get out of the vehicle." When petitioner did not comply promptly, Hill repeated twice in rapid succession, "Get out of the vehicle," and "Place your hands on the dashboard." Petitioner started to comply with the latter order, then stopped, placed his hands on his lap, and became "fidgety." Detective Hill thereupon stepped back from the car, pointed his revolver at petitioner and ordered him to get out of the vehicle. Meanwhile, Detective Sanchez-Serrano, who had approached the vehicle from the other side, assumed that something was going wrong from his partner's tone of voice, and ordered Anderson and the juvenile to leave the car. When Anderson complied, Sanchez-Serrano grabbed Anderson and brought him around to the driver's side just as petitioner was getting out of the car. As petitioner left the car, a tinfoil packet fell to the ground. After picking it up and feeling something in it, Detective Hill placed both petitioner and Anderson under arrest. A search of the vehicle resulted in the discovery of

additional tinfoils on the floor and seat and a shaving bag that contained narcotics paraphernalia. The tinfoil packets were later determined to contain heroin.

2. Petitioner contends that his Fourth Amendment rights were violated when the officers, without probable cause to arrest, approached the vehicle and ordered him out of the car. Accordingly, he argues that the evidence seized at the time of his arrest should have been suppressed.[1/] However, as the majority below correctly concluded, in an exhaustive opinion on which we largely rely, the officers' conduct was a permissible investigative stop under Terry v. Ohio, 392 U.S. 1 (1968).

a. While there is no question that petitioner and Anderson were "seized" for Fourth Amendment purposes when the police ordered them out of the car, the police action here was the sort of brief, limited intrusion that, under Terry and its progeny, may properly be upheld on less than probable cause to arrest. See, e.g., Adams v. Williams, 407 U.S. 143 (1972); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Delaware v. Prouse, 440 U.S. 648 (1979). The officers first approached the Oldsmobile merely to investigate a suspicious circumstance and not to make an arrest. As the court of appeals found (Pet. App. 11), the officers intended only to question petitioner and Anderson and make a visual inspection of the vehicle from the outside. Nor was the investigatory stop transformed into an arrest by virtue of the fact that the officers had their revolvers in hand when they approached the car. It was a reasonable precaution for the officers to unholster their weapons in light of their awareness that a substantial number of individuals involved in street drug arrests are armed (id. at 13-14), that the possibility of flight existed (id. at 14 n.30), and that they were operating in a high

---

1/ Petitioner does not raise a separate challenge to the warrantless search of the shaving bag. Cf. Robbins v. California, No. 80-148 (argued Apr. 27, 1981); New York v. Belton, No. 80-328 (argued Apr. 27, 1981).

crime area (id. at 15 n.34).[2] Cf. Terry v. Ohio, supra, 392 U.S. at 23-24. It was similarly reasonable for the officers to order petitioner and Anderson out of the vehicle in order to maintain control of the situation and assure their own safety (Pet. App. 17-22). See Pennsylvania v. Mimms, 434 U.S. 106 (1977). Finally, in light of petitioner's hesitation and furtive hand movements, Detective Hill acted reasonably when he pointed his weapon at petitioner to enforce his order that petitioner leave the vehicle (Pet. App. 22-25). Cf. Adams v. Williams, supra, 407 U.S. at 148.[3]

b. Nor was the conduct of the officers impermissible because their investigatory stop was preceded by an anonymous tip. As the majority below held (Pet. App. 25-37), there was ample suspicion to justify the stop when the officers corroborated the detailed tip by their own observations. Thus, here, as in United States v. Cortez, No. 79-404 (Jan. 21, 1981), slip op. 6, the police had "a particularized and objective basis for suspecting the particular person[s] stopped of criminal activity," even though they made no direct observations of incriminating behavior.

2/ Although evidence that the neighborhood was a high crime area did not emerge until the trial, it is well established that in reviewing the denial of a motion to suppress an appellate court can consider trial evidence in addition to evidence adduced during the suppression hearing. See Carroll v. United States, 267 U.S. 132, 162 (1925); United States v. Griffin, 555 F.2d 1323, 1326 n.3 (5th Cir. 1977); United States v. Quiroz-Carrasco, 565 F.2d 1328, 1330 (5th Cir. 1978).

3/ The brief investigatory stop in this case was far less intrusive than the detention involved in Dunaway v. New York, 442 U.S. 200 (1979). In Dunaway, the defendant was picked up by police at a neighbor's house and transported to the police station for interrogation. The detention in Dunaway lasted two hours, but might have continued indefinitely if Dunaway had not made an incriminating statement. Moreover, the physical move in Dunaway -- involving a drive to the police station -- was extremely intrusive. Finally, as Dunaway itself makes clear, a detention for custodial interrogation may be subjected to stricter limitations than a brief, on-the-street stop to investigate suspicious activity, such as occurred here.

The tip provided specific information concerning the location of the suspicious activity, the identity of one of the participants, and the license plate numbers of both vehicles involved (Pet. App. 25-26). Moreover, the tip described a particular pattern of behavior, which suggested that the informant was familiar with the modus operandi of the participants (id. at 32-33). While the corroboration of these details might not have been sufficient to elevate the tip to probable cause (id. at 27), it did give rise to reasonable suspicion sufficient to support a Terry stop (id. at 28-31). As the court of appeals concluded (id. at 35), nothing "in Terry or its underlying rationale * * * require[s] that the articulable facts and inferences upon which reasonable suspicion may rest can never be grounded in an anonymous tip, where an array of noncriminal details have been corroborated by the offficers' own observations and where the suspects are in a position to move away." On the facts of this case, therefore, the officers were not required to ignore the verified tip about narcotic trafficking merely because it was anonymous.4/ In the absence of probable cause to effect an arrest, the officers' intermediate response of approaching the vehicle to identify its occupants and ascertain whether there was any criminal activity afoot was the only realistic alternative available to them.5/

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.
Solicitor General

JUNE 1981

4/ The majority correctly observed (Pet. App. 31-32; footnote omitted) that "citizen informants in narcotic-ridden neighborhoods want to retain anonymity for fear of retaliation from traffickers."

5/ "Short of such a stop, the police [could] only sit, wait and hope they [would] see from afar some suspicious conduct inside the suspect's car (not a likely possibility), or else follow one or both of the suspects when they drive on or leave the car, thereby risking the loss of their trail in traffic or darkness" (Pet. App. 34).